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Supreme Court of the United States.

OCTOBER TERM, 1905.

JAMES B. HOWARD, ... Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

SUPPLEMENTAL BRIEF OF W. M. SMITH ON BEHALF OF PLAINTIFF IN ERROR.

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Of Counsel.

F. C. HUBBMACHER PRESS, LOUISVILLE, KY.

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Supreme Court of the United States.

No. 888.

JAMES B. HOWARD, ... *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

Supplemental Brief for Plaintiff in Error.

I.

For plaintiff in error, it is insisted that a Federal question is seasonably presented, although made for the first time in the Appellate Court, by a petition for rehearing, provided said court passes upon same, and holds against the party invoking protection under the Constitution or laws of the United States. (See original brief, pp. 27-28, for authorities relied on.)

The petition for rehearing is found on pages 75, 76 and 77 of printed transcript of record, and the response thereto on page 78.

II.

Plaintiff in error charges in his petition for rehearing (p. 75 of transcript), and in his assignment of errors (pp. 88-91), that he has been deprived of his liberty *without due*

process of law, and *has been denied the equal protection of the laws*, guaranteed by the Fourteenth Amendment of the Constitution of the United States of America.

III.

Section 7 of the Constitution of the State of Kentucky preserves the ancient right of trial by jury. Section 11 of said Constitution, and Sections 183 and 229 of the Kentucky Criminal Code of Practice, are but declarations of the common law as to the fundamental right secured to the accused by the criminal law, that is, to be present during the whole trial; his presence being not only a right, but a jurisdictional fact that cannot be waived.

Section 233 of said Constitution adopts the laws of Virginia in force June 1, 1792.

Ray vs. Sweeney, 77 Ky. p. 9, holds that the common law, that is, the rules and principles in force before the fourth year of the reign of James I, were in force in Virginia in 1792, and are therefore the law of Kentucky, except in so far as they have been changed or modified, and this Honorable Court has held in a number of cases that in such changes or modifications the State must have due regard for the fundamental rights of the accused. As to the last proposition, see Civil Rights Cases, 109 U. S. 11 (27-835), in which it is said:

> " It does not authorize Congress to create a Code of Municipal Law for the regulation of private rights, but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when they are subversive of the fundamental rights specified in the Amendment."

In United States vs. Cruikshanks, *et al.*, 92 U. S. 554 (23-588), it is said:

"The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."

IV.

The rights of the accused to be present from the time of the arraignment to the judgment, is a fundamental right, protected by the Fourteenth Amendment; it cannot be waived; nor can the State, through any of its instrumentalities, impair said right or avoid the necessity of such presence.

At common law temporary absence is excepted, so in Kentucky; in said State the common law doctrine obtains, permitting only the exceptions therein found. In the original brief for plaintiff in error, the cases sustaining these contentions, are fully cited (pages 69 to 135, inclusive).

V.

When a plea of jeopardy or the forfeiture of bond is considered, then it is universally held that the trial does not begin until the jury is sworn.

But when the fundamental rights of the accused to be present when the jury is being selected, that is, the absolute necessity for such presence at the most critical time of the trial, is considered, then the protection of such right cannot be had without holding that the trial begins when the defendant is arraigned.

See Hopt's People of Utah, 110 U. S. 574.

VI.

J. C. Alexander was the eleventh juror tested and accepted by both the Commonwealth and the defendant, when the Commonwealth's attorney suggested to the court that he had a matter he desired to present to the court out of the presence of the other jurors accepted; thereupon defendant and all the attorneys in the case retired to a private room, and the Commonwealth's attorney filed the affidavit of one Ben Hackett and asked that J. C. Alexander be discharged from said jury, to which objections were entered by defendant.

The said Hackett having previously qualified as a juror in said case, and having been previously challenged by defendant and excused, the court refused to consider the first charge in his affidavit against Alexander, that is, that he and Alexander had both talked about the case and expressed an opinion therein, before the trial began; the following order and bill of exceptions were made and filed (see transcript, pages 32, 33, 34 and 35), to-wit:

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, Plaintiff,
vs.
Jas. B. Howard, Defendant.
} Order.

Commonwealth's Attorney Franklin came into the court and, in the presence of the accused and his counsel, stated that he had a matter that he desired to bring to the attention of the court, away from the presence of the jury. Thereupon the court, counsel for the Commonwealth, the defendant in person, and his counsel, retired to the county judge's office. Thereupon the attorney for the Commonwealth filed the affidavit of Ben. F. Hackett, and, for reasons

therein shown, moved the court to discharge Juror J. C. Alexander from service as a juror on the trial of this case, to which motion defendant by counsel objected, and argument of counsel on both sides being heard upon the objection, it was agreed by counsel on either side that the court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to said Hackett while in the custody of the sheriff, "Hello, Ben! I am glad they cut you off of this jury as I did not want to serve on this jury with you"; and the said Alexander having admitted the truth of said statement, but claimed that said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the court when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged; and the court, being thus advised, overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel excepts.

Thereupon the defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court, being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel excepts.

The following affidavit was filed April 10th, 1903.

FRANKLIN CIRCUIT COURT.

Commonwealth of Kentucky, vs. James B. Howard.	Affidavit of Ben Hackett.

This affiant, Ben Hackett, says that after the killing of William Goebel, he and Mr. J. C. Alexander, who had been accepted on the jury to try said case, had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been

a conspiracy to murder Goebel among those who were charged with this murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him. These arguments and conversations occurred at different times and places in Woodford County during the time that has elapsed since the murder of Mr. Goebel, were frequent and much earnest feeling was expressed by both this affiant and Mr. Alexander therein.

This affiant further says that on yesterday afternoon, late, after Mr. Alexander had been accepted as a juror to try the case and after the affiant had been excused, after those accepted as jurors had been charged and admonished by the court, and immediately after the adjournment for supper, and as the jury was being conducted by the sheriff away from the courthouse, affiant, by accident, met the jury as they were passing out through the courthouse yard, when, in passing, Mr. Alexander said to this affiant, "Hello, Ben! I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Affiant, Ben Hackett, says the foregoing statements are true.

BEN HACKETT.

Subscribed and sworn to before me by Ben Hackett this April 10th, 1903.

JAS. H. POLSGROVE,
County Judge, Franklin Co.

The following bill of exceptions was filed April 10, 1903.

FRANKLIN CIRCUIT COURT.

Commonwealtth of Kentucky, Plaintiff,
vs.
Jas. B. Howard.
} Bill of Exceptions

Be it remembered:—

That on the trial of this case, on the 10th day of April, 1903, there had been tested and accepted by both Common-

wealth and defendant herein, eleven jurors, J. C. Alexander being one of them, and the twelfth juror had been called and qualified himself, as a competent juror.

Thereupon the Commonwealth's attorney, together with the attorneys assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterwards returned into the court and filed the affidavit of Ben Hackett, which is as follows:

(Said affidavit is here copied in the bill.)

And moved the court, for reasons shown in said affidavit, to discharge said J. C. Alexander from service as a juror on the trial of this case, to which the defendant by counsel at the time objected, and the court overruled said objection, and discharged said Alexander from service as a juror herein, to which defendant at that time excepted, and still excepts. That at the time said motion was entered, and said Alexander was so discharged, the Commonwealth had exhausted of its peremptory challenges three, and the defendant had exhausted of his peremptory challenges twelve.

That on said motion to discharge said Alexander, and before he was discharged by agreement with counsel upon either side, the court privately examined said Alexander as to the truth of the charges as to what he said to said Hackett while he, Alexander, was in the custody of the sheriff; and the court thereupon, being advised, discharged said Alexander as stated. To all said rulings of the court defendant at the time objected and excepted, and objects and excepts, and files this said bill of exceptions, duly signed and approved by the court.

JAMES E. CANTRILL,
Judge.

By said order it is shown that the court only examined Alexander as to what he said to Hackett while he (Alexander) was in charge of the sheriff, and for that, *and that alone*, excused him, because, although jocularly said, the court held that it was a violation of the admonition of the court; the bill of exceptions shows that the court privately

examined Alexander and as to what matter (see transcript, pages 32, 33, 34 and 35).

VII.

For the Commonwealth it is contended, that "the right to challenge is the right to reject, and not to select, a juror."

And the case of "Spiers," among others, is referred to as sustaining this doctrine; these were all cases, however, wherein the juror had not been "accepted."

In the case at bar, the juror had been "accepted" by both sides.

In Kentucky the selection of a jury is governed solely by statute.

Section 250 of the Criminal Code of Kentucky provides:

> "If a juror has been accepted, but before the jury has been completed one of the accepted jurors becomes so sick as to prevent the continuance of his duty, the court may excuse such juror, and complete the formation of the jury as if he had been originally accepted."

A juror tested and accepted stands in the same attitude as one "sworn," so far as the right of the court or parties to excuse is concerned.

Kentucky Criminal Code, 251.

A juror who has been "accepted" can only be excused when an absolute necessity for such excuse arises, and if the court excuses such a juror, in a case where no such necessity exists, it is an abuse of discretion.

Munday vs. Commonwealth, 81 Ky. 233.
Coloins vs. Commonwealth, 22 Ky. Law Reporter.
O'Brien vs. Commonwealth, 72 Ky. 333.

In Max Kling vs. Missouri, 80 U. S. 263, this identical

question arose, and the court clearly indicated in said opinion that on this point the case would have been venired, but for another question that is not in this case at bar.

But the question here is not one of excusing a juror, but of examining a juror who has been "accepted," out of the presence of the accused; after the juror has been accepted he has such a right to claim his services on the jury as entitled him to be heard, both himself and witnesses. It is part of the trial, and his presence cannot be waived.

VIII.

On the trial of this case on April 8th, 1903, the court made an order showing that out of the entire panel selected only one qualified, and therefore ordered a venire of 150 to be summoned from Woodford County. (See page 5 of transcript.)

Afterwards the following order was made (see page 8 of transcript).

It is thus shown that the entire panel was discharged and the venire of 150 ordered to be summoned from Woodford County.

Defendant moved that these jurors be drawn from the "wheel." This motion was overruled and exceptions reserved. By a clerical error, which corrects itself, the motion is entered to draw from the Woodford County wheel.

By the latter clause of Section 2247 of the Kentucky Statutes it is provided:

> "That, should the court discharge during the term the whole of any panel, then their places shall be

supplied by the judge drawing from the drum or wheel."

(See page 165, brief of plaintiff in error.)

This proceeding was not "due process of law" or "equal protection," and the affidavits filed on motion for new trial (page 168 of transcript) show the prejudicial results to the accused therefrom.

IX.

While the Court of Appeals of Kentucky passed on these questions, especially the one raised as to the examination of Alexander out of the presence of the accused, still it further held that it could not reverse for any of said points raised, because of Section 281 of the Criminal Code of Practice of Kentucky, which provides:

> "The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

This question as to the examination of Alexander out of the presence of defendant is not "a challenge to the panel," or "for cause," or "a motion to set aside an indictment," or "motion for new trial," and cannot possibly fall under said Section, and the court in so holding deprived accused of "due process of law" and equal protection thereof. "A lawful statute may be so unlawfully administered as to entitle the accused to protection under the Fourteenth Amendment."

In Smith vs. Commonwealth, 20 Ky. Law Reporter, 1848, it is said: "It is true that Section 281 of the Code provides that the decision of the lower court upon chal-

lenges to the panel and for cause, upon a motion to set aside in indictment, and upon motions for a new trial, shall not be subject to exceptions. But that section has no application to the mode of selecting and empaneling the jury."

In both the petition for rehearing, and the assignment of errors, this construction of this section, given by the Court of Appeals, is complained of, as well as the section.

This case was appealed upon the whole record, the error as to the examination of Alexander is apparent in the record. The Court of Appeals passed upon it fully; it had jurisdiction of the case, and whether it be that said section is unconstitutional or is merely so construed by the highest court of the State as to abridge the fundamental right of accused, the question is the same, and the protection of the Fourteenth Amendment may be invoked.

If the section is in itself unconstitutional, then the Court of Appeals did right in disregarding same and taking jurisdiction, and passing on the question.

On the other hand, if the error consists, alone, in the construction given this section by the highest court of the State, then this court can review same, because such construction, attempting to include this examination of Alexander under said section, is not due process or equal protection, and, as the error is apparent upon the record, and violates a fundamental right of the accused, and passed on by the Court of Appeals, under said state of facts, a review by this court can be had; no exception is necessary, as the point cannot be waived.

Miller vs. Nicholls, 4 Wheat. 311 (4-578).

State legislatures may regulate appeals, but in doing so shall not deprive the accused of any fundamental right; otherwise the Fourteenth Amendment can be invoked.

See Rogers against Alabama, 192 U. S. 226.

In Bush against Kentucky, 107 U. S. 110 (27-354), this court ordered a reversal and indictment quashed; this section was then in full force, and the case seems to be directly in point.

In Powers against Commonwealth, 27 Ky. Law Reporter, decided by Judge Cochran, District Judge, Eastern District of Kentucky, but only reported in 27 Ky. Law Reporter it was held that Section 281 of Kentucky Criminal Code was an unlawful hindrance and obstacle to the rights of the accused, and disregarded same.

In the case of Powers vs. Commonwealth, 26 Kentucky Law Reporter, 1118, Judge Barker, of the Kentucky Court of Appeals, made a similar decision.

In *Ex parte* Powers, 129 Federal Reporter, 990, Judge Evans, of the Western District of Kentucky, said:

> " It is averred in the petition that the jury in this case was a packed jury, and that the manner of its selection was such as would only result, and was intended to result, in having a jury pledged in advance to convict the prisoner; but even that gives me no right to interfere, for, if we assume the facts to be true as stated, and if the questions of constitutional law growing out of them shall properly and adequately appear in the record of the State court, the remedy of the petitioner is complete through his appeal to the Court of Appeals of the State, and, if that tribunal should concur with the Circuit Court in denying or ignoring the constitutional rights claimed by the petitioner, the Supreme Court of the United States would doubtless assume jurisdiction upon a writ of error. Nor can it be supposed that this could be prevented by Sections 280 and 281 of the Criminal Code of Kentucky, which exclude the right of exception to anything that may be done in the formation of the jury in the trial court; for otherwise every constitutional guaranty could be crippled or destroyed by similar means with ease and facility. Shutting off, or

attempting to shut off, consideration by a higher court of such questions, while allowing all others which may affect results involving the life or liberty of the accused to be reviewed and corrected, can have no effect upon the rights or powers of the Supreme Court under the Constitution of the United States, if, indeed, the Court of Appeals itself can constitutionally ignore or be exempted from the duty of enforcing the constitutional rights of the citizen, if appealed to for the purpose. See, especially, Rogers vs. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. The constitutional provisions referred to are of higher sanction than any statute or Code, and create rights which it is the duty of the judicial tribunals to protect and enforce, any law of any State to the contrary notwithstanding."

X.

Under Section 340 of the Kentucky Criminal Code of Practice, it is held that:

"Unless it affirmatively appear from the record that the accused was in no wise prejudiced by such an error, a reversal would result."

Allen vs. Commonwealth, 86 Ky. 642.
Meece vs. Commonwealth, 78 Ky. 586.
Temple vs. Commonwealth, 77 Ky. 796.
Rutherford vs. Commonwealth, 78 Ky. 640.
Crowley vs. United States.

Yet in this case at bar the Court of Appeals holds that it does not affirmatively appear that the rights of the accused have been prejudiced, reversing entirely the rules of law.

In Rutherford vs. Commonwealth of Ky., 78 Ky. 640, it is said: "When there is a departure from the funda-

mental rules of criminal procedure, this court should reverse, unless it affirmatively appear from the record, that the error complained of was not prejudicial."

The court will discover, upon comparison of opinions of Court of Appeals in brief and that in transcript, that they differ; that in brief was copied from copy of opinion furnished when case was decided.

Respectfully submitted,

W. M. SMITH,
Attorney for Plaintiff in Error.